Supreme Court, U.S.
FILED
APR 25 2003
CLERK OF THE COURT

No. 02-1423

IN THE

Supreme Court of the United States

BELLSOUTH CORPORATION AND BELLSOUTH TELECOMMUNICATIONS, INC.,
Petitioners,

v.

COVAD COMMUNICATIONS COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR ALLEGIANCE TELECOM, INC., ATX COMMUNICATIONS, INC., EL PASO NETWORKS, L.L.C., FOCAL COMMUNICATIONS CORP., PAC-WEST TELECOMM, INC., AND US LEC CORP. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does § 2 of the Sherman Act, 15 U.S.C. § 2, require a monopolist to permit access on reasonable terms to an essential facility under its control, where it is feasible for it to permit such access and the monopolist does not establish that it has a legitimate business justification to refuse?

2. Does a monopolist's refusal to deal with a competitor, where its refusal preserves its monopoly power and it does not establish that it has a legitimate business purpose for its refusal, violate § 2 of the Sherman Act, 15 U.S.C. § 2?

3. Does the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.*, protect incumbent telephone monopolies from application of the antitrust laws, despite its express antitrust savings clause, 47 U.S.C. § 152 (Historical and Statutory Notes), and the harmony between its goals and those of the Sherman Act?

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae Allegiance Telecom, Inc., ATX Communications, Inc., El Paso Networks, L.L.C., Focal Communications Corp., Pac-West Telecomm, Inc., and US LEC Corp. are competitive telephone companies (known as competitive

[1] No one other than the named *amici* wrote this brief in whole or in part, or made any monetary contribution to its preparation. The parties' written consents to the filing of this brief are being filed with the Clerk herewith.

local exchange carriers, or "CLECs") that seek to compete with incumbent monopoly telephone companies ("ILECs") in markets for local telephone service throughout the United States. Some *amici* are currently litigating monopolization claims against ILECs. All *amici*, including those not currently involved in antitrust litigation, have an interest in obtaining a prompt and authoritative judicial determination of the extent to which, and how, § 2 of the Sherman Act governs markets for local telephone service.

As six of the most experienced CLECs in the nation, *amici* compete with, and purchase services from, ILECs, including BellSouth Corporation and Verizon Communications Inc. *Amici* Allegiance Telecom, ATX Communications, Focal Communications, Pac-West Telecomm, and US LEC all serve retail end-users, while El Paso Networks is a wholesale carrier that offers transport and other services to other carriers. Allegiance, Focal, and US LEC were each founded shortly after passage of the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("'96 Act"). Today, both Allegiance and Focal operate in markets around the country. US LEC concentrates its operations in the southeast and the mid-Atlantic region. ATX and Pac-West trace their origins to the 1980s and the telecommunications revolution initiated by the break-up of AT&T. ATX operates in the midwest and on the east coast. Pac-West is a regional provider, with operations focused on the west coast. El Paso's network covers most of the metropolitan areas in Texas.

Though each of the *amici* has a different business model, all are facilities-based competitors attempting to compete with historical monopolies. *Amici* have an interest in seeing present uncertainties in relevant antitrust law clarified, so that all parties operating in local telephone service markets understand their competitive rights and obligations and can make business decisions accordingly.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court recently granted certiorari in *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*,305 F.3d 89 (2d Cir. 2002), *cert. granted,* No. 02-682 (Mar. 10, 2003) ("*Trinko*"), which concerns, in part, the application of the antitrust laws to markets for local telephone service. Resolution of the question by this Court is much needed. There are strong disagreements between ILECs and CLECs nationwide, and among the lower courts, about what § 2 of the Sherman Act requires in these markets and even whether it applies at all.

As BellSouth says, this case, *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002) ("*Covad*"), "presents the same important question concerning the scope of an alleged monopolist's duties under Section 2 of the Sherman Act that is raised in . . . *Trinko*." BellSouth Corporation Petition for a Writ of Certiorari at 2, No. 02-1423 ("BellSouth Pet."). This case also provides, however, an important and different perspective on the issues and an enhanced framework, in the form of a highly detailed complaint, for evaluating them. Moreover, given the range of specific issues presented in *Trinko*, there is no assurance that the Court's decision will resolve the ones currently animating myriad disputes. Granting certiorari in this case and consolidating it with *Trinko* for argument would provide the Court with a more robust framework for review of the issues presented, and would ensure that important aspects of the issues are not left unaddressed or reviewed only after a prolonged delay.

The prospects for competition in markets for local telephone service now seem considerably less bright than they did after passage of the '96 Act. At that time, many CLECs entered or significantly expanded their competitive efforts in markets for local telephone service. Much of this was committed entry: CLECs invested $55 billion in telecommunica-

tions infrastructure in the United States. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 516-517 (2002). But today more than 50 CLECs have declared bankruptcy, and of over 300 CLECs in operation in 1999, only about 70 remain. J. Eisenach, *The Real Telecom Scandal*, Wall Street Journal (September 30, 2002). Seven years after passage of the '96 Act, effective competition seems far in the future; ILECs still hold an overwhelmingly dominant position in most local markets. *See* Federal Communications Commission, Local Telephone Competition: Status as of June 30, 2002 at Table 6 (December 2002) (www.fcc.gov/wcb/iatd/comp.html).

While there is more than one cause of this shattered landscape, ILECs have vigorously opposed the advent of competition. Of course, competitors, even monopolists, are encouraged to compete vigorously on the merits. But the conduct of many ILECs in markets for local telephone service reflects their conviction that, because of the '96 Act, they are not subject to antitrust remedies, and that, in any event, the antitrust laws prohibit very little, if any, unilateral conduct. As some *amici* have formally alleged in court filings, they have encountered outright obstruction by ILECs of their efforts to compete in markets for local telephone service. This obstruction has been unreasonable, sustained, and unjustified by legitimate business purposes. Indeed, much of the misconduct—unannounced and unwarranted disruptions of service to CLEC customers, dysfunctional ordering and provisioning systems, opaque and error-laden billing processes—is inefficient for the ILEC as well as for the CLEC. The ILEC's purpose has not been to improve its own operations or make its services more attractive, but to impose disproportionately greater and disabling costs on CLECs in order to preserve the ILEC's monopoly power.

Trinko raises issues about the permissible conduct of monopolists in the context of injured consumers. Consolidating the instant case with *Trinko* would assist the Court in its review of the merits of Trinko's antitrust claim in two ways.

First, since *Trinko* arises on an appeal of a motion to dismiss, there is no evidentiary record in the case, only the bare allegations of the complaint. *Covad* also arises on a motion to dismiss, but the inclusion of a second complaint, one that is highly detailed, in the pleadings before the Court would assist it in evaluating the nature and consequences of the arguments presented.

Second, if the Court reaches the antitrust merits in *Trinko*, as petitioners and its supporting *amici* have urged, its decision will have a direct impact on competition in markets for local telephone service, immediately affecting the business conduct of both ILECs and CLECs. *Covad* provides the CLEC dimension to the "same question" raised in *Trinko*. As it reviews and decides the competitive issues, the Court should augment the complaint in *Trinko* with a parallel case that squarely presents competitors' circumstances, which may be directly affected by *Trinko*'s outcome.

There is also the risk that in *Trinko* the Court may ultimately focus its attention in another direction and never reach the merits of the antitrust claim, since *Trinko* raises a variety of issues. This would leave unresolved the current uncertainty in the courts and in the marketplace about what antitrust limits, if any, govern the ILECs' conduct. All market participants are in need of guidance on these issues from this Court. In addition, a number of antitrust cases pending against ILECs are likely to be delayed during *Trinko*'s pendency, in the hopes that clarification of the applicable principles will issue from the Court. Consolidating this case with *Trinko* would greatly increase the likelihood that the guidance needed by all of the players in local telephone service markets would be more promptly forthcoming from this Court.

BellSouth recognizes that some issues of critical importance to ILECs and CLECs may ultimately be left unresolved in *Trinko*, so it urges a two-step process on the

Court—asking the Court to hold BellSouth's petition pending the decision in *Trinko*, and review this case only if the *Trinko* decision leaves important issues unaddressed. While that process is consistent with the Court's common practice, it would be problematic here. It would leave the prospect that this case, and the guidance it can provide for CLECs and ILECs across the country, might be delayed for two years or more. Alternatively, it would deprive the Court of the benefit of Covad's pleading and the CLEC perspective in the event that it does address all relevant antitrust issues in *Trinko*. Both of these unfortunate outcomes can be avoided by consolidated review of *Covad* and *Trinko*.

In seeking certiorari in *Trinko*, Verizon and *amici* supporting its petition, including both federal antitrust agencies, a coalition of private corporations, and BellSouth—the petitioner here, named the following issue as worthy of the Court's attention, among others:

> (1) the scope of a monopolist's obligation under the Sherman Act to provide access, where feasible, on reasonable terms to an essential facility within its control. Verizon Petition for Writ of Certiorari at 12-18, No. 02-682 ("Verizon Pet."); *Amici Curiae* Brief for United Parcel Service, et al., at 10-16, No. 02-682 ("UPS Brief").

This issue raises the related, more general issue of:

> (2) the scope of a monopolist's obligation under the Sherman Act to do business with a rival, where its refusal to deal preserves monopoly power and it does not demonstrate a legitimate business justification for its conduct. Verizon Pet. at 12, 17; *Amici Curiae* Brief for the United States Department of Justice and the Federal Trade Commission at 11-12, No. 02-682 ("U.S. Brief").

Also presented in the filings in support of certiorari is the question of:

> (3) the relevance of the '96 Act to application of the Sherman Act in markets for local telephone service. Verizon Pet. at 18-21.

All of these issues are present in *Covad*. All are within the scope of the question on which the Court granted certiorari in *Trinko*, *i.e.*, whether the Court of Appeals erred in reversing the District Court's dismissal of Trinko's antitrust claims. As to each of these issues, consolidated consideration of *Covad* and *Trinko* would significantly enhance the factual context provided, thereby enabling fuller analysis by the Court. It would ensure that important open issues are more promptly addressed, and it would permit the Court to assess the issues with representatives of all affected parties before it.

ARGUMENT

1. The centerpiece of Verizon's petition for certiorari in *Trinko* is its multifaceted assault on the essential facilities doctrine. *Covad* raises the "same question," albeit in the context of injured competitors. Yet while *Trinko*'s complaint alleges that CLEC service "requires access" to local telephone infrastructure, the complaint alleges the elements of an essential facilities claim only in general terms. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983). It gives the defendant notice of the antitrust claim against it (Verizon does not contend otherwise), but it provides a skeletal framework for the Court's first review of essential facilities issues since 1912. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). Verizon criticizes *Trinko*'s complaint as too conclusory, and there is no other record in the case.

Thus, while Verizon and BellSouth seek to have this Court address critical issues of antitrust doctrine, they ask the Court to do so on a very limited set of facts. The Court should

decline the invitation to provide an authoritative delineation of the dimensions of the essential facilities doctrine, with direct effects for competitors, solely on the basis of *Trinko*'s consumer complaint.

Considering Covad's complaint at the same time that it considers Trinko's would provide the Court with a considerably augmented factual context for the issues presented. Covad offers detailed, specific allegations about its need for access to the local telephone networks controlled by an ILEC, the feasibility of permitting access, and how Covad has been denied reasonable access. It also details the consequences of that denial for a business attempting to provide innovative competition. Consolidated review of the *Trinko* and *Covad* cases would provide a meaningful framework for the Court's analysis of essential facilities principles. It would enable the Court to examine the relevant competitive issues with representatives of both competitors and consumers before it.

Amici agree with Verizon and BellSouth that Court review of the essential facilities doctrine is in order. The doctrine is raised in an increasing number of consumer and competitor antitrust claims against the ILECs, with inconsistent results in courts across the country. Moreover, dramatically disparate understandings of relevant law are continuing to create uncertainties and conflicts in the business relationships between ILECs and CLECs across the country, giving rise to additional disputes.

As Verizon and BellSouth emphasize, the essential facilities doctrine has not been embraced by this Court. It has, however, been adopted by every circuit. *See, e.g., Interface Group, Inc. v. Massachusetts Port Authority,* 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.,* 902 F.2d 174, 179 (2d Cir. 1990); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.,* 90 F.3d 737, 748 (3rd Cir. 1996); *Advanced Health Care Servs. v. Radford Community Hosp.,* 910 F.2d 139, 150 (4th Cir. 1990); *Mid-*

Texas Communications Sys., Inc., v. American Tel. & Tel. Co., 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI v. AT&T,* 708 F.2d at 1132-33 (7th Cir.); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds,* 472 U.S. 585 (1985); *Covad v. BellSouth*, 299 F.3d at 1285 (11th Cir.); *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-58 (Fed. Cir. 1999). *See generally*, R. Pitofsky, D. Patterson, and J. Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law,* 70 Antitrust L.J. 443 (2002).

Local telephone infrastructure has long been considered the textbook example of an essential facility. *See, e.g., Southern Pac. Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 980 (D.C. Cir. 1984); *MCI v. AT&T,* 708 F.2d at 1132-33. As this Court recently observed, "[i]t is easy to see why a company that owns a local exchange (what the Act calls an 'incumbent local exchange carrier,' 47 U.S.C. § 251(h)), would have an almost insurmountable competitive advantage . . . . A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the 'last mile' of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses." *Verizon Communications Inc. v. FCC,* 535 U.S. at 490.

a. Verizon raises a number of arguments against the essential facilities doctrine, some that attack the doctrine directly, and some that would leave it standing in the abstract,

but not meaningfully applicable in any real-world circumstances. BellSouth's petition echoes many of these arguments. Verizon and BellSouth would have the Court address their far-reaching contentions in the constricted context of Trinko's consumer complaint, which lays little groundwork for the inquiries they propose.

For example, Verizon contends that while the essential facilities doctrine may sometimes mandate access, any access at all, no matter how unreasonably conditioned, is sufficient. Verizon Pet. at 13-14. BellSouth raises the same argument. BellSouth Pet. at 15-16. In their view, a monopolist can satisfy its obligation by providing access that is so unreasonably limited that it affords no opening for meaningful competition. Adoption of this position would, of course, frustrate the purpose of the essential facilities doctrine, which is to promote competition.

The ILECs' argument conflicts with considerable precedent that holds, not surprisingly, that where the essential facilities doctrine applies, it requires access to be made available on reasonable terms that provide an opportunity for meaningful competition. *See, e.g., Fishman v. Estate of Wirtz*, 807 F.2d 520, 541 (7th Cir. 1986) ("[a]greeing to deal on unreasonable terms is merely a type of refusal to deal."). *See also City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 648 (10th Cir. 1990), *overruled on other grounds*, *Systemcare Inc. v. Wang Labs. Corp.*, 117 F.3d 1137 (10th Cir. 1997) (plaintiff must show that the defendant "did not provide access to its pipeline on reasonable terms, equivalent to a denial of access"); *Alaska Airlines, Inc. v. United Airlines*, 948 F.2d 536, 542 (9th Cir. 1991) ("the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first"); *Laurel Sand & Gravel, Inc. v. CSX Trans. Inc.*, 924 F.2d 539, 545 (4th Cir.

1991) (applying the "reasonable standard of the access factor"); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d at 179-80 ("there need not be an outright refusal to deal in order to find . . . denial of an essential facility . . . . [i]t is sufficient if the terms of the offer to deal are unreasonable.").

Not surprisingly, Trinko, as a consumer and not a competitor in telephone service markets, does not in its complaint describe at length the extent to which and precisely how Verizon denied access to its CLEC supplier. Thus, *Trinko* is a particularly inappropriate vehicle for this Court to utilize in evaluating the extent of access required by the essential facilities doctrine. Since it relates to a competitor case, Covad's complaint provides significantly more detail, describing how reasonable access has been denied in a number of different specific circumstances. Consolidation of *Covad* with *Trinko* would provide the Court with an enhanced framework within which to address the ILECs' argument.

b. Verizon also contends that the essential facilities doctrine cannot force a monopolist to enter a new line of business. Verizon Pet. at 13-14. If it has not sold services at wholesale in the past, it cannot be compelled to begin, even if its denial of access preserves its monopoly power and it has no legitimate business justification for the refusal. BellSouth makes the same argument. BellSouth Pet. at 14. Of course, while this approach would pretend to leave essential facilities principles in place as a matter of doctrine, in most circumstances there would be no remedy for their violation. The doctrine would effectively be wiped off the books.

The ILECs' argument is based on the assumption that ILECs did not sell wholesale services prior to the adoption of the '96 Act. Certainly after that Act was passed, new regulations and practices came into play, but ILECs have sold services at wholesale to long-distance carriers ever since

the breakup of AT&T in 1983. In addition to its questionable factual basis, this argument involves fundamental issues about the scope of antitrust law and the courts' remedial powers.

Trinko's complaint provides only a very limited glimpse of the issues arising under Verizon's and BellSouth's argument. While Covad's complaint also provides limited insight into the contention, it lays out the nature of the local network and the services currently sold in a more detailed way, and would assist the Court in evaluating this argument.

c. Verizon argues as well that the essential facilities doctrine cannot require it to permit a competitor to "occupy" and have "exclusive" use of its premises. Verizon Pet. at 14. BellSouth echoes this contention. BellSouth Pet. at 6. Of course, a right of access, if exercised, necessitates at least a temporary presence. If a competitor cannot enter an essential facility, it can hardly be said to have access to it. And if a competitor cannot temporarily lease lines from the local telephone network, at the behest of a customer that has chosen to do business with the competitor, the competitor cannot be said to have meaningful access to the network. Again, Verizon's and BellSouth's argument would purport to leave the essential facilities doctrine in place while removing any remedy for its violation.

Surrendering *exclusive* access—that is, allowing some access—is what the essential facilities doctrine is about. A monopolist may not unreasonably exclude competitors from its facility in order to prevent them from competing against it. *MCI v. AT&T*, 708 F.2d at 1132-33. When Verizon allows a CLEC access to the local telephone network for the purpose of serving a customer that has chosen to do business with the CLEC, Verizon does not, as it asserts, "abandon" those facilities. Verizon continues to own, occupy, and use the local network. And should the customer decide to switch to

Verizon service, Verizon utilizes those facilities to provide the customer with service.

Again, having the *Covad* complaint before it would assist the Court in evaluating the ILECs' argument. As a consumer, Trinko in its complaint does not provide details that would inform an analysis of the type of access necessary if the essential facilities doctrine is to provide a meaningful remedy for monopolization. Covad's complaint offers far more in the way of description of the network, the nature of the use involved in CLEC leasing of elements of the network, and the ways in which reasonable access to the network is necessary in order for a CLEC to compete.

2. The essential facilities doctrine is closely related to precedent on anticompetitive refusals to deal. Verizon Pet. at 11; U.S. Brief at 11-12; BellSouth Pet. at 6. Like the cases considering the essential facilities doctrine, these decisions address a monopolist's refusal to do business with a competitor. Unlike the essential facilities doctrine, however, refusal-to-deal precedent focuses not on whether the monopolist controls a facility to which access is essential for competition, but on the related albeit more fundamental issue of the competitive effects of the monopolist's conduct. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). The issue is whether the monopolist's conduct preserves its market power. *See Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (refusal to deal with customer that is also doing business with a competitor).

The analysis in these cases recognizes that in a competitive market, sellers generally seek out as much business as they can find. Where a refusal to do business preserves monopoly power, therefore, it warrants careful scrutiny. *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.) ("The monopoly supplier who retaliates against customers who have the temerity to

compete with him, by cutting such customers off, is severing a collateral relationship in order to discourage competition.").

Refusal-to-deal precedent also expressly incorporates the business justification defense emphasized in the U.S. Brief, although this defense has been a part of most § 2 litigation of all types in recent years. For example, Trinko expressly alleges the absence of a legitimate business justification for Verizon's conduct, although the existence of a legitimate business justification is a defense and need not be affirmatively alleged in a complaint.

Careful consideration of the essential facilities doctrine will require attention to closely related precedent on monopolistic refusals to deal. Again, Covad's complaint would add context useful for the Court's analysis.

3. Underlying Verizon's *Trinko* petition is the contention that conduct that violates the '96 Act cannot also violate § 2 of the Sherman Act. The argument also appears in BellSouth's petition in this case. BellSouth Pet. at 17-19. It is supported by language in the Seventh Circuit's decision in *Goldwasser v. Ameritech Corp.*, cited with approval by both Verizon and BellSouth. 222 F.3d 390 (7th Cir. 2000). The notion is that even if the anticompetitive conduct alleged by Trinko and Covad would violate § 2, that statute does not apply because there is in place a regulatory scheme designed to encourage competition.

This argument conflicts with a long line of precedent applying the antitrust laws even to highly regulated industries. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) (electricity); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963) (banking); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966) (shipping); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (securities); *United States v. RCA*, 358 U.S. 334 (1959) (broadcasting); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (agriculture);

Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 349 F. Supp. 1064, 1068 (D. Haw. 1972) (air travel). If the existence of a regulatory scheme precluded application of the antitrust laws, they would govern very little of the nation's commerce.

Thus, regulatory and antitrust regimes often overlap. *See, e.g., Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 729 (9th Cir. 1981) (Kennedy, J.) ("[a]ntitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct. There is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry.")

Moreover, the '96 Act contains an express antitrust savings clause. 47 U.S.C. § 152 (Historical and Statutory Notes). Verizon's and BellSouth's contentions that the '96 Act weakens or eliminates antitrust jurisdiction over their conduct cannot be reconciled with this provision.

Even without the provision, the '96 Act would not be read to repeal § 2 by implication in the absence of "plain repugnancy" between that statute and the Sherman Act. *Philadelphia Nat'l Bank*, 374 U.S. at 351. The plain repugnancy test is based on the bedrock principle of statutory construction that, wherever possible, statutes should be read to complement rather than conflict with one another. *OXY USA v. Babbitt*, 122 F.3d 251, 258 (5th Cir. 1997). One statute's repeal of another is to be implied only where necessary to make both statutes work, and even then, only to the extent necessary. *Silver v. New York Stock Exch.*, 373 U.S. at 357.

The '96 Act and the Sherman Act have largely parallel purposes, namely the promotion of competition for the benefit of consumers. The '96 Act is intended to encourage competition in both local and long-distance telephone service markets by allowing incumbent local firms to offer long-

distance service if they interconnect with competitive local firms in certain enumerated ways. 47 U.S.C. §§ 251(c), 252, 271. The Sherman Act is a "comprehensive charter of economic liberty," *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958), which bars the maintenance of monopoly power through exclusionary conduct of any kind. 15 U.S.C. § 2; *United States v. Microsoft Corp.*, 253 F.3d 34, 64 (D.C. Cir. 2001) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

Despite the statutory savings clause and well-established principles of statutory interpretation, *Trinko* raises the issue, echoed in *Covad*, of the applicability of § 2 to local telephone service markets. This issue is well within the confines of the question on which certiorari was granted in *Trinko*. Again, consolidating *Covad* with *Trinko* for argument would provide useful additional context for the Court's review of the issue and would ensure that important aspects of the issue are not left unaddressed. This Court's determination of the issue would provide much-needed guidance to competitors and consumers participating in these markets.

CONCLUSION

The petition for a writ of certiorari should be granted and this case consolidated for argument with *Trinko*.

Respectfully submitted,

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